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No. 94-1140

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) 6
California v. LaRue, 409 U.S. 109 (1972) 6
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 5
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 2, 4
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 4, 7
City of Newport, Ky. v. Iacobucci, 479 U.S. 92 (1986) 6
Craig v. Boren, 429 U.S. 190 (1976) 5
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 6
Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) 4-5
Edenfield v. Fane, 113 S. Ct. 1792 (1993) 6
Ibanez v. Florida Dep't of Business & Professional Regulation, 114 S. Ct. 2084 (1994) 2, 6
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) .. 5
Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen., 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986) 5
New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) 6
Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) 4
Pennsylvania State Police, Bur. of Liquor Cont. Enforcement v. Hospitality Invs. of Phila., Inc., 1994 WL 643906 (Pa. Nov. 3, 1994), *petition for cert. filed* (U.S. Jan. 20, 1995) (No. 94-1247) 3, 5
Wisconsin v. Constantineau, 400 U.S. 433 (1971) .. 5

STATUTES AND OTHER AUTHORITIES:

Ark. Alco. Bev. Cont. Div. Regs. § 3.17 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ark.] ¶ 4217 (1994) 7

TABLE OF AUTHORITIES—Continued

Page

Conn. Dep't of Liquor Cont. Regs. § 30-6-A40 (1976) *reprinted in* Liquor Cont. L. Rep. (CCH) [Conn.] ¶ 6034H (1994) 7

Ga. Alco. Bev. Code § 560-2-4-.15 (1994) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ga.] ¶ 4158 (1994) 7

Kan. Stat. Ann. § 41-714(2) (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Kan.] ¶¶ 7236-38 (1994) 7

Minn. Liquor Cont. Div. Regs. § 7515.0760(2) (1985) *reprinted in* Liquor Cont. L. Rep. (CCH) [Minn.] ¶ 4038(2) (1994) 7

Mo. Div. of Liquor Cont. Regs. § 11 CSR 70-2.240(18) (1986) *reprinted in* Liquor Cont. L. Rep. (CCH) [Mo.] ¶ 4142G(18) (1994) 7

N.H. Rev. Stat. Ann. § 179:51 (1992) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.H.] ¶ 7251 (1994) 7

N.C. Admin. Code tit. 4, r. 2R.1008(c)(2) (1984) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.C.] ¶ 4448(c)(2) (1994) 7

Ohio Rev. Code Ann. § 4301.211 (Anderson 1989) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ohio] ¶ 7172A (1994) 7

R.I. Gen. Laws § 3-8-7 (1987) *reprinted in* Liquor Cont. L. Rep. (CCH) [R.I.] ¶ 7210 (1994) 7

S.C. Alco. Bev. Cont. Comm'n § 7-34 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [S.C.] ¶ 4034 (1994) 7

Laurence H. Tribe, *American Constitutional Law* § 6-24 (2d ed. 1988) 6

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BRIEF OF AMICUS CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

INTEREST OF AMICUS

The Association of National Advertisers, Inc. ("A.N.A."), the advertising industry's oldest trade association, is exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operat-

ing units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80 percent of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of truthful, non-deceptive commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.[1]

STATEMENT

The facts of the case are ably set forth in the petition for certiorari. For purposes of this brief, the key point is the First Circuit's reliance on the Twenty-first Amendment to dilute the test for judging the constitutionality of restrictions on commercial speech. That four-prong test was originally set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (*"Central Hudson"*), and has been affirmed and reinforced in a long line of decisions, the most recent of which is *Ibanez v. Florida Department of Business & Professional Regulation*, 114 S. Ct. 2084 (1994) (*"Ibanez"*).

Addressing the third prong of *Central Hudson*, the First Circuit initially recognized that a State has the burden of proving that its restriction on commercial speech directly advances the asserted governmental interest. App. 4-5.[2] But the First Circuit then effectively reversed that burden by holding that the Twenty-first Amendment requires an "added presumption" in favor of the State if the regulated speech concerns alcohol beverages. Based in part on that "added presumption," the First Circuit found that the third prong had been satisfied. App. 8.

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[1] A.N.A. has filed with the Court the parties' letters of consent to the filing of this brief.

[2] The citation form "App. ——" refers to the appendix to the petition herein.

REASONS FOR GRANTING THE WRIT

The federal and state courts conflict as to whether the Twenty-first Amendment affects the First Amendment's protection of commercial speech that concerns alcohol beverages. Although we are mindful of the Court's reluctance to consider *amicus* briefs on petitions for certiorari, extraordinary circumstances are present: petitions for certiorari on the Twenty-first Amendment issue are pending both in this case and in *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, 1994 WL 643906 (Pa. 1994), *petition for cert. filed* (U.S. Jan. 20, 1995) (No. 94-1247) ("*Hospitality Investments*"). The only realistic prospect for resolving the growing conflict on this important constitutional issue is a decision from the Court in either or both this case and *Hospitality Investments*.

At one end of the spectrum lie the three cases that have held that the Twenty-first Amendment reduces commercial speech rights, but those cases are in substantial disagreement as to the extent of that reduction. In *Hospitality Investments*, the Supreme Court of Pennsylvania has taken the most extreme position by holding that the Twenty-first Amendment strips commercial speech concerning alcohol beverages of all First Amendment protection, and that the intermediate scrutiny of *Central Hudson* must be replaced by a test of whether the State's restriction "bear[s] a reasonable relation to the evil sought to be controlled." *Hospitality Investments*, 1994 WL 643906 at *1-*2. Like the First Circuit in this case, the Pennsylvania Court upheld a ban on price advertising for alcohol beverages. *Id.* at *3. A powerful dissent criticized the majority for "simply go[ing] too far in sustaining the challenged regulation without an analysis of the free speech protections afforded the licensee under the First Amendment of the federal constitution . . . ." *Id.* at *8 (Castille, J., dissenting). Indeed, the Pennsylvania

Court's creation of a "reasonable relationship" test contravenes this Court's explicit statement that it has "rejected mere rational basis review" in judging restrictions on commercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993) (*"Discovery Network"*).

The other two courts that have relied on the Twenty-first Amendment—the First Circuit here and the Tenth Circuit—at least purport to apply *Central Hudson*, but differ as to how that test should be altered where commercial speech concerns alcohol beverages. *See* App. 1-12; *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 499-500 (10th Cir. 1983) (*"Oklahoma Telecasters"*), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). The First Circuit here appeared to rely on the Twenty-first Amendment solely to relax its scrutiny under the third prong—whether the restriction on speech directly and materially advances the asserted governmental interest. App. 8. In *Oklahoma Telecasters*, the Tenth Circuit stated that the Twenty-first Amendment required it to give added deference to the government not only under the third prong, but also the second prong—whether the asserted governmental interest is substantial—*and* the fourth prong—whether the restriction is no more extensive than necessary to serve the asserted interest. 699 F.2d at 499-502.

At the opposite end of the spectrum of cases lies *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 567 U.S. 1259 (1984). There, a majority of the 13 judges of the Fifth Circuit who considered this issue *en banc* expressly rejected the argument that the Twenty-first Amendment weakens the First Amendment's protection of alcohol beverage advertising. *Id.* at 755 (five dissenting judges incorporating prior panel opinion (701 F.2d 314, 330) that the Twenty-first Amendment does "not change the standard of review" for restrictions on commercial speech); *id.* at 753-54 (two concurring judges rejecting expansion of Twenty-first

Amendment as "mischievous and insidious").[8] Similarly, the Michigan Court of Appeals held in *Michigan Beer and Wine Wholesalers Association v. Attorney General*, 370 N.W.2d 328, 335 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986), that the "Twenty-first Amendment does not require us to deal with restraints on freedom of speech any differently than we would if alcoholic beverages were not involved."

The conflict in the state and federal courts should be resolved in favor of according full commercial speech protection to truthful, non-misleading alcohol beverage advertising. "The Twenty-first Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) (citations omitted). Rather, " 'the Amendment primarily created an exception to the normal operation of the Commerce Clause.' " *Id.* (citation omitted). Accordingly, this Court has held repeatedly that the Twenty-first Amendment does not alter the customary judicial analysis of governmental restrictions on individual constitutional rights. *See Craig v. Boren*, 429 U.S. 190, 207 (1976) (equal protection rights); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (First Amendment establishment clause rights); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (due process rights).

By ignoring this principle of Twenty-first Amendment jurisprudence, both the First Circuit here and the Pennsylvania Court in *Hospitality Investments* instead erroneously expanded the narrow exception that applies only where States prohibit simulated sexual acts, nudity or topless dancing on premises licensed to sell alcohol. App. 8; *Hospitality Investments*, 1994 WL 643906 at *2-*3. In

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[8] The *Dunagin* court upheld the constitutionality of Mississippi's intrastate liquor advertising ban, but only the plurality opinion, adopted by a six-judge minority, relied on the Twenty-first Amendment.

that special context, this Court has held that the Twenty-first Amendment confers an "added presumption in favor of the validity of the state regulation." *California v. LaRue*, 409 U.S. 109, 118 (1972); *see City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 97 (1986); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981). *LaRue, Bellanca* and *Iacobucci* are not relevant because (1) the challenged statutes in each were an exercise of core Twenty-first Amendment power to regulate the environment in which alcohol sales take place on licensed premises—nowhere else—and thus only indirectly regulated expressive activity, *and* (2) they involved expression (conduct, really) "only marginally" within "the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2457 (1991). *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975); Laurence H. Tribe, *American Constitutional Law* § 6-24 at 478 n.15 (2d ed. 1988). In contrast, the restrictions on price advertising here and in *Hospitality Investments* regulate pure commercial speech, not marginal expressive conduct, and prohibit price advertising everywhere *except* on licensed premises.

In addition to the need to resolve the conflict among the state and federal courts, the Court also should grant the petition in either or both this case and *Hospitality Investments* because of the importance of the First Amendment rights at stake. Just last year, the Court emphasized that commercial speech rights are highly protected from governmental restrictions:

> The State's burden is not slight; the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

Ibanez, 114 S. Ct. at 2089 (citation omitted); *see Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993).

The decisions in both this case and *Hospitality Investments* erroneously rely on the Twenty-first Amendment to "seriously underestimate[]" the commercial speech rights of every participant in the alcohol beverage industry. *See Discovery Network*, 113 S. Ct. at 1511. Moreover, the impact of the Twenty-first Amendment on those rights is likely to be the subject of more litigation because many states have imposed similar restrictions on alcohol beverage advertising.[4] The federal and state courts that

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[4] *See, e.g.*, Ark. Alco. Bev. Cont. Div. Regs. 3.17 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ark.] ¶ 4217 at 7247 (1994) (prohibiting advertising of discount sales); Conn. Dep't of Liquor Cont. Regs. § 30-6-A40 (1976) *reprinted in* Liquor Cont. L. Rep. (CCH) [Conn.] ¶ 6034H at 10,221 (limiting price advertising); Ga. Alco. Bev. Code § 560-2-4-.15 (1994) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ga.] ¶ 4158 at 13,244 (prohibiting price advertising by "off-premise" licensees except within the establishment); Kan. Stat. Ann. § 41-714(2) (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Kan.] ¶¶ 7236-38 at 18,427 (prohibiting retailers from billboard advertising); Minn. Liquor Cont. Div. Regs. § 7515.0760(2) (1985) *reprinted in* Liquor Cont. L. Rep. (CCH) [Minn.] ¶ 4038(2) at 25,222 (banning price advertising except in windows and premises of licensed establishments); Mo. Div. of Liquor Cont. Regs. § 11 CSR 70-2.240(18) (1986) *reprinted in* Liquor Cont. L. Rep. (CCH) [Mo.] ¶ 4142G(18) at 27,232 (prohibiting manufacturers and wholesalers from price advertising); N.H. Rev. Stat. Ann. § 179:51 (1992) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.H.] ¶ 7251 at 31,429-30 (prohibiting listing of retail prices by a wholesaler on behalf of a distributor); N.C. Admin. Code tit. 4, r. 2R.1008(c)(2) (1984) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.C.] ¶ 4448(c)(2) at 35,254 (prohibiting "on-premise" licensees from advertising the brand name of any alcohol beverage); Ohio Rev. Code Ann. § 4301.211 (Anderson 1989) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ohio] ¶ 7172A at 37,419 (prohibiting price advertising for malt beverages except within the licensed establishment); R.I. Gen. Laws § 3-8-7 (1987) *reprinted in* Liquor Cont. L. Rep. (CCH) [R.I.] ¶ 7210 at 41, 423-3 (prohibiting price advertising for alcohol beverages except within the licensed establishment); S.C. Alco. Bev. Cont. Comm'n § 7-34 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [S.C.] ¶ 4034 at 42,212 (prohibiting retailers from price advertising).

will hear those future lawsuits need guidance from this Court on the Twenty-first Amendment issue—guidance that is sorely lacking from the irreconcilable array of decisions rendered by the lower courts during the past 12 years.

CONCLUSION

The petition for certiorari in either or both this case and *Hospitality Investments* should be granted.

Respectfully submitted,

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